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IN THE

SUPREME COURT OF THE UNITED STATES.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a Corporation,
Petitioner,
v.
MERCANTILE-COMMERCE BANK AND TRUST COMPANY, a Corporation, HARTLEY B. COMFORT and SIM BEAM COMFORT, Co-Executors of the Last Will and Testament of Clarence R. Comfort, Deceased,
Respondents.
No. 469.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

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JURISDICTIONAL STATEMENT.

Jurisdiction of this Court is not properly invoked under Section 240 of the Judicial Code, as amended, Title 28 USCA, Sec. 347, 43 Stat. 938.

The petition does not present a matter within the principle of:

Erie Railroad Company v. Thompkins, 304 U. S. 64;
Lyon v. Mutual Benefit Health and Accident Association, 305 U. S. 484;
Fidelity Union Trust Company v. Field, 311 U. S. 169;
West v. American Telephone and Telegraph Company, 311 U. S. 223;
Stoner v. New York Life Insurance Company, 311 U. S. 464;
Moore v. Illinois Central Railroad Company, 312 U. S. 630.

Application for this writ has not been made within three months after entry of the judgment determining between the parties the principal issues sought to be reviewed as required by Sec. 8 of the Act of Feb. 13, 1925, as amended, Title 28 USCA, Sec. 350, Sec. 8, 43 Stat. 940.

STATEMENT OF THE CASE.

Petitioner in its Brief presents a Statement of the Case. In view of the issues sought to be reviewed, respondents believe that it will not be undue repetition to restate the case in order that the Court may have before it matters omitted or briefly referred to in petitioner's statement.

ISSUES TRIED.

The case was instituted in January, 1941, by respondents, Co-Executors of the Last Will and Testament of Clarence R. Comfort, deceased, against petitioner, The Equitable Life Assurance Society of the United States, for Total and Permanent disability benefits under the terms of two policies of life insurance issued in 1921.

The petition upon which this cause has been tried is in two counts—one count on each policy in question. The

policy provisions are identical; the pertinent provisions are quoted on pages 2 and 3, Petitioner's Statement.

It is alleged in paragraph "5" of each count of the petition that "Clarence R. Comfort, on or about the 30th day of May, 1930, became permanently and continuously disabled within the meaning of said policy up to and including the date of the insured's death, which occurred on or about the 26th day of July, 1940, in that on said 30th day of May, 1930, the insured suffered a complete heart block, chronic myocarditis, hypertension of the heart and chronic nephritis, which said diseases have continued from on or about May 30, 1940, and progressively became worse until the death of said deceased" (R., Vol. I, pages 5-6, 11-12).

The petitioner in its answer denied the allegation of total and permanent disability within the meaning of the policies in suit, and pleaded by way of affirmative defense, among others, waiver of the alleged claim and estoppel to assert the same (R., Vol. I, pages 12-17).

Upon the issues and evidence adduced at the first trial, the District Court found that "on May 29, 1930, the insured became totally and permanently disabled. Claim for disability benefits and waiver of premium was made and allowed" (Finding of Fact No. 2, R., Vol. I, p. 177), and the Court refused to amend this finding on motion of petitioner so that the same would read, "presumably totally and permanently disabled" (R., Vol. I, pp. 191, 201).

The District Court also found that when the insured wrote the letter of March 15, 1932, quoted at page 15 of petitioner's Brief, and when he paid annual premiums thereafter, "he acted under the mistaken conclusion of fact that he was not totally and permanently disabled within the meaning of the policies" (R., Vol. I, p. 179).

The District Court in its Conclusions of Law declared that the insured was "totally and permanently disabled

during the period from February 12, 1932 to May 18, 1939" (the period here in question), and had not waived his claim, nor were plaintiffs estopped to maintain this action" (R., Vol. I, pp. 179, 180).

The District Court also entered Findings of Fact and Conclusions of Law to the effect that petitioner waived the furnishing of proof of disability for the period here in suit (R., Vol. I, p. 179). After entry of the judgment on December 31, 1942, in favor of respondents for the amount sued for (R., Vol. I, p. 180), petitioner duly perfected its appeal to the United States Circuit Court of Appeals for the Eighth Circuit.

The Appellate Court sustained all of the Findings of Fact and Conclusions of Law referred to, except the Finding and Conclusion that petitioner had waived the furnishing of proof of disability for the period in suit. The Court concluded that under the issues presented by the pleadings and evidence the cause should be remanded for the limited purpose of "findings, conclusions, and judgment as to the sufficiency of the proof of loss on May 30, 1930 to serve, under the circumstances, as proof of loss of the claimed 'continuous' disability extending through the period here involved" (R., Vol. I, p. 223). Under the opinion and mandate this limited issue was to be determined upon such "additional evidence" as might be submitted by the parties and "the evidence heretofore introduced" (R. Vol. I, pp. 224, 225).

After an unavailing motion by petitioner for rehearing, the judgment on this appeal was entered June 12, 1944 (R., Vol. I, p. 225).

The trial of the special issue framed by the mandate and opinion of the Circuit Court of Appeals was had, beginning January 31, 1945, before the District Court.

At the time of that trial there had been adjudicated and determined as between the parties the following:

1. That the insured became totally and permanently disabled within the meaning of the policies in suit on May 29, 1930;

2. That such disability was continuous from May 29, 1930 until the insured's death in 1940;

3. That the insured made claim for disability benefits and waiver of premium after the onset of the total and permanent disability which began May 29, 1930;

4. That the petitioner granted and paid the same until it received from the insured a letter under date of March 15, 1932 reading as follows:

> "Referring to your Policy #2851347, and also Policy #2856767, and your Disability Claim #20847 on the above policies. Also referring to your Policy #2450-58 and Disability Claim #G6063 on this Policy.
>
> "I wish to advise you that I am back at my desk for short periods each day. I hope to regain my strength sufficiently to be able to continue at work and unless you hear from me to the contrary before the end of the month, you need not send the checks on the above claims.
>
> "I wish to thank you very heartily for the promptness with which the checks have come after my Claims were allowed. They have been very helpful in the emergency which arose because of my sickness."

5. That the letter of March 15, 1932, above quoted, and insured's subsequent conduct did not waive insured's rights under the policies, nor were his Executors, respondents here, estopped from asserting the same.

At the conclusion of the trial on the special issue, the District Court entered Findings of Fact, Conclusions of Law, and a Judgment in favor of respondents (R. Vol. II, pp. 355 to 358).

Petitioners again perfected their appeal to the Circuit

Court of Appeals for the Eighth Circuit, which court on June 4, 1946 sustained the Findings of Fact and Conclusions of Law of the District Court on the special issue. Petition for rehearing was overruled July 17, 1946 (R. Vol. II, p. 390).

SUMMARY OF EVIDENCE AT FIRST HEARING.

Mr. Comfort, the insured, for many years prior to the issuance of the policies here in question, which were issued in November, 1921, had suffered from what is known as a heart block. This disease was acquired rather than congenital (R. Vol. I, p. 44). In May, 1930, when the insured was approximately 50 years of age (R. Vol. I, p. 110), the condition had become aggravated, resulting in attacks of faintness and shortness of breath. In May of that year he consulted Dr. Taussig, a physician of the City of St. Louis.

This doctor testified that he then examined the insured and found that he was suffering from a serious heart ailment, the result of heart block known as Stokes-Adams disease (R. Vol. I, p. 44). Stokes-Adams disease, which is the result of an acquired heart block, is a permanent serious disease of the heart which becomes progressively worse and eventually results in death (R. Vol. I, pp. 46, 47, 48, 51). In fact, Mr. Comfort died in July, 1940, from progressive heart disease almost ten years to the day after the onset of these attacks in May, 1930 (R. Vol. I, p. 46).

It appears from the medical testimony that when an individual is suffering from heart block, a condition exists in which the ventricles of the heart do not regularly receive stimuli which control the pulse rate. There is a connection between the upper portion of the heart and the lower portion by means of muscle fiber, known as "hiss". This bundle of hiss acts as a telegraphic wire or conduit, conducting from the upper portion of the heart to the ventricles the impulse which regulates the heart beat. When this connection between the upper and lower por-

tions of the heart is impaired, the ventricles establish a heart beat or rhythm of their own independent of any controlling stimuli, and a slow pulse rate is established. In Mr. Comfort's case, the independent heart rhythm established by the ventricles was at a rate of 36 to 44 beats per minute (R. Vol. I, p. 43). The normal heart beat is approximately 72 beats per minute.

A Stokes-Adams attack develops when an impulse suddenly comes from the upper portion of the heart through the bundle of hiss to the lower portion of the heart. The lower portion of the heart, not being accustomed to regular stimuli, because of the block, is thrown into a form of spasm or convulsion. This spasm or convulsion causes the heart to cease beating entirely for short or longer periods of time. This results in faintness, and if at all protracted, in unconsciousness. If this condition continues for any appreciable length of time, death will result (R. Vol. I, pp. 43-44).

In May, 1930, Mr. Comfort's heart disease had progressed to the stage above described, and the doctor considered his condition to be "very definitely alarming" (R. Vol. I, p. 44), and testified that the Stokes-Adams attacks are a feared and expected result when an individual is suffering from acquired heart block. The doctor also testified that this heart disease is "necessarily progressive" and "is bound to get worse as time goes on," and further as follows:

> "Q. He (the insured) died as a result of the ailment you describe through the period from 1930 to 1939? A. Yes, sir" (R. Vol. I, p. 46).

The testimony of Dr. Taussig was confirmed and corroborated at the first hearing by Dr. William Smith, Mr. Comfort's family physician. He specifically stated that "In 1930, due to myocarditis and cardiac degeneration" these attacks began; that Mr. Comfort grew progressively

worse from 1930 until the date of his death in July, 1940 (R. Vol. I, pp. 53, 54).

After the onset of these attacks, in May of 1930, Mr. Comfort later, in 1930, with the assistance of the Company's agent, Bradley, prepared, on blanks furnished by the Company, proofs of disability, which were submitted to the Company in October, 1930 (R. Vol. I, p. 101).

In the insured's statement (Defendant's Exhibit 12, R. Vol. II, pp. 375, 377, 379), captioned by the Company "Disability Claim", there appears, in response to some of the printed questions appearing on the form the following answers:

Question.	Answer.
"8. (a) State the last day on which you did any work.	'A. May 29, 1930.'
"10 (b) State date you expect to assume some business duties.	'A. Have no idea.'

"12. On the '29th' day of 'May' 19'30' I became wholly disabled as a result of 'heart trouble.'"

(The material in single quotes are the answers written by the insured. The remainder of the quotation are the printed questions appearing on the form.)

Dr. Taussig, in the Physician's Statement, Plaintiff's Exhibits E-1, E-2 (R. Vol. II, pp. 26-28), advised petitioner that he had previously treated the insured for "complete heart block," which had existed "since November 16, 1917"; that the insured had had a "history of long continued heart block"; that the insured was not able to pursue any gainful occupation and had not been able to do so "since early in May of 1930" and that he, the doctor, did "not know" when the insured would be able to resume any business.

The forms submitted also requested a "brief" statement from the doctor, in which petitioner was advised that the insured had "symptomless heart block for many years. In May, 1930, a sino-auricular block set in with long periods of asystole and Adams-Stokes syndrome," and further advised that there had been repeated E. K. G. examinations of the insured.

This doctor in response to the question, "Is it **possible** that he will be prevented for life from following any occupation?" stated, "Possibly." (Emphasis ours.)

Dr. Smith's statement, which appears as Plaintiff's Exhibits E-3 and E-4 (R. Vol. II, pp. 28-30), is in many respects the same as Dr. Taussig's, he advised petitioner that he did not know when the insured would be able to resume any business, and, in response to the question as to whether or not the insured is growing worse, advised petitioner that the insured "has myocarditis."

In response to the question requesting a brief statement from the physician, this doctor advised petitioner as follows:

> "Patient has heart rate 36 to 44 for about 12 years. May, 1930, developed Arrythmia. Rate went to 60 and 80 and would change suddenly. Patient would almost faint. Electrocardiogram showed 11 seconds of asystole."

He further advised petitioner of the electrocardiograph tracings and that it was his opinion that the insured was so disabled that he was wholly prevented from pursuing all gainful occupations and that it was "possible" that he would be so prevented for life.

Upon the receipt of these proofs by the Company, in October, 1930, the claim was allowed and no further information was requested by petitioner.

It also appeared, in the record at the first hearing, that

Mr. Comfort had paid a greater or rated-up premium for the policies of life insurance containing the disability and premium waiver benefits here in suit. (The information relating to this matter was further developed at the second hearing.)

Evidence was introduced relating to Mr. Comfort's physical and business activities during the period here in question. Since no attack is made upon the Finding and Conclusion that the insured during the period in question was totally and permanently disabled within the meaning of the policies in suit, this evidence will not be reviewed other than to state that such evidence was substantial, that the insured, within the tests applied by the Missouri Courts, was totally and permanently disabled.

It having been established by the first trial that the insured was totally and permanently disabled, had not waived his claim for the policy benefits, and that respondents, his Executors, were not estopped to assert the same, the only question before the Court in the second hearing was whether or not the technical requirement of proof had been made sufficiently to bring into fruition the policy benefits, for which benefits, because of the knowledge of the company, a rated-up premium had been paid.

SUMMARY OF EVIDENCE ON SPECIAL ISSUE.

It appears from the evidence on the special issue at the second hearing that petitioner knew of Mr. Comfort's heart condition prior to the issuance of the policy here in suit, and that this resulted in rated-up premiums for the policies (R. Vol. II, p. 265). The background of their issuance is as follows:

On November 20, 1929, Dr. G. C. Trawick, the Medical Referee for petitioner, located in St. Louis, wrote petitioner's Medical Director in New York, one Dr. T. H. Rockwell, as follows:

"Dear Dr. Rockwell:—Subject: Clarence R. Comfort
Born July 1st, 1880

"Will you kindly advise if you care to consider the above named for life insurance on any plan? He appears to be a perfectly normal risk, with the exception of his pulse, which I find to be today thirty-four (34) beats to the minute. He gives a history of having a very slow pulse for the last five years, following an attack of Grippe" (Respondent's Exhibit B, R. Vol. II, p. 5).

In reply to this letter, Dr. Rockwell wrote Dr. Trawick on December 30, 1920, as follows:

"My dear Doctor:

Subject: Clarence R. Comfort
Born: July 1, 1880

"In reply to your letter of November 29th, we regret to advise that the Approving Officers are unable to consider the above-named applicant for insurance on any plan" (Respondent's Ex. A, R. Vol. II, p. 6).

Later, however, it was concluded to examine Mr. Comfort for the insurance now in suit, which examination was made in St. Louis by Dr. Trawick, in the presence of Dr. Rockwell, on October 28, 1921. This examination (Respondent's Ex. C, R. Vol. II, pp. 11, 13) confirmed the slow pulse and, by notation, called attention to the above quoted correspondence (R. Vol. II, p. 8).

The Medical Examiner, Dr. Trawick, testified, both in depositions and at the trial, that the record of the slow pulse appearing from the examination, and the correspondence, would indicate to a doctor that the insured was then suffering from heart block (R. Vol. II, pp. 18 and 20).

Drs. Kountz and Luten, heart specialists, who testified on behalf of respondents, stated that they had reviewed the proofs of disability furnished petitioner by insured in October, 1930, consisting of Defendants' Exhibit 12

(R. Vol. II, pp. 377, 379) and Plaintiff's Exhibits E-1 to E-4 (R. Vol. II, pp. 26-30), together with the memoranda or correspondence between the Medical Director of petitioner and its Medical Referee in St. Louis (Respondent's Exhibits A and B, R. Vol. II, p. 9, and Respondent's Exhibit D, R. Vol. II, p. 15), together with medical examination upon which these policies were issued (Respondent's Exhibits C-1 and C-2, R. Vol. II, p. 11). They further testified that based upon the information contained therein their opinion was as follows:

Dr. Kountz—

> "Q. Would you say from those reports and that medical history that the condition would improve or go the other way? A. Certainly get worse.
>
> Q. Certainly get worse? A. Yes. That is, over a period of time.
>
> Q. You could expect in the future—(interrupting). A. He would probably get a little better, and they do temporarily, but over any period of time it is always progressive—downhill.
>
> Q. Is there any warning as to when the Stokes-Adams attacks may occur? A. No, sir.
>
> Q. And any time one of them may occur, death may result? Is not that correct, Doctor? A. That is right" (R. Vol. II, p. 32).

This doctor further testified that the opinion above expressed would have been the same in 1930 (R. Vol. II, p. 59).

Dr. Luten, using the same exhibits, expressed the same opinion (R. Vol. II, pp. 60, 61, 63, 64, 68, 75, 76).

Doctors who testified on behalf of petitioner, while not agreeing to the foregoing conclusions, confirmed the serious nature of heart blocks and Stokes-Adams attacks (Strauss, R. Vol. II, pp. 172, 175, 193, 205).

It also appears from the Record that Petitioner's General Agent in St. Louis, who was acquainted with the insured, saw him from time to time during the period here

in dispute and knew that "he (the insured) was suffering from a serious heart disease" (R. Vol. I, p. 103); that he, the insured, "had an abnormal heart condition" (R. Vol. II, p. 269), of which fact he had previously advised Petitioner by letter of November 28, 1930 (R. Vol. I, p. 92). Likewise, the agent of Petitioner who sold these policies and assisted in the preparation of the proofs above referred to testified that he saw the insured during the period in question from time to time and that he considered the insured to be a "marvel" to look so well "because he knew he was a sick man" (R. Vol. I, p. 101).

The Circuit Court of Appeals in reviewing the Findings of Fact and Conclusions of the District Court applicable to the special issue concluded that the Judgment should be sustained under the provisions of the policy requiring Petitioner to perform its contractual obligations " 'during the continuance of such total and permanent disability' " and further held:

> "What we have said requires affirmance of the judgment. It is not necessary, therefore, to discuss the contentions of the insurer in relation to any other findings and conclusions of the trial court. We may add, however, that the evidence sufficiently supports Findings 4 and 5, 59 F. Supp. at p. 793, and that these findings also would require affirmance of the judgment" (R. Vol. II, p. 388).

The findings referred to in the Court's opinion, which appear in the Record, Volume II, page 356, are to the effect that the proofs of October, 1930, together with all of the other information in the possession of the company and chargeable to it, were reasonably sufficient "for defendant to have knowledge that insured's physical condition of total disability was a continuing and permanent state and would grow progressively worse in all probability" and "gave said company the essential facts upon which its liability under the policies here in suit would depend."

SUMMARY OF ARGUMENT.

I.

The Jurisdiction of This Court Is Not Properly Invoked.

This writ is not applied for on the basis that any substantial public question is involved. It is not charged that any provision of the Constitution or a statute has been considered in the opinion sought to be reviewed.

The sole basis for the writ is that the Circuit Court of Appeals has failed to follow Missouri law. However, there is no claim of a failure to follow a particular case adjudicating issues between these same parties; nor even, a case adjudicating a precise issue. On the contrary, it is essentially a petition for rehearing containing a charge that the Circuit Court of Appeals has failed to follow and apply general principles of law such as the law of equitable estoppel. Such a general charge is not sufficient to invoke the jurisdiction of this Court. If it were, this Court would become a supreme court of appeals.

Further, the principal issue sought to be reviewed, "estoppel," was determined adversely to petitioner in a judgment rendered June 12, 1944 (R. Vol. I, p. 225). No petition for certiorari followed.

The cause was remanded not for a general retrial, but for a limited trial on a special issue (R. Vol. I, pp. 223, 224, 225). The issues on the former trial had been finally adjudicated between the parties, including the defense of estoppel. This writ, therefore, as to such issue, which seems to be a premise of practically every point urged, is not timely.

Even so, the petition is without merit.

II.

The Circuit Court of Appeals Properly Applied to the Facts the Law of Estoppel as Announced by the Missouri Courts.

The District Court in the first trial held that the insured's representatives, respondents, here, were not estopped to assert this cause of action for disability benefits under the policies here in question (R. Vol. I, pp. 179, 180). The Circuit Court on June 12, 1944, sustained the District Court (R. Vol. I, p. 213). These courts likewise held that the insured had not waived these contractual rights, because of the insured's lack of knowledge of the essential facts at the time the act claimed to be the basis of the waiver and estoppel occurred, i. e., the letter of March 15, 1932 (R. Vol. I, pp. 179, 211). The findings on waiver are not attacked by petitioner; the lack of knowledge of the insured, therefore, must stand as admitted.

Despite the contention of petitioner to the contrary (petitioner's Brief, p. 22), under the law of Missouri absent "knowledge" and "conscious misrepresentation," no basis in fact exists for the defense of estoppel, and the Circuit Court of Appeals properly so found (see cases cited by respondents under Point II of this Brief).

III.

The Circuit Court of Appeals Properly Sustained the District Court in Finding and Adjudging Upon the Trial of the Limited Issue That the Proofs in Question Were Sufficient to Serve as Proofs for the Period in Suit.

The District Court at the second trial had before it the limited issue above specified. That Court's findings, conclusions, and judgment in favor of respondents were sustained by the Circuit Court of Appeals June 4, 1946. Rehearing denied July 17, 1946 (R. Vol. II, p. 390).

Under the law of Missouri, due proof to meet the condition precedent to bring into benefit the disability provisions of a life insurance policy is liberally construed both as to form and substance.

The insured having furnished such proof in 1930 which was accepted and never questioned by petitioner was not called upon to furnish new proof of the same disability but only "continuation" thereof during the period in suit. Such are the policy provisions here in question, and such is the law of Missouri. The Circuit Court of Appeals properly so found.

The District Court also found that the proofs of 1930, together with the information which the petitioner had concerning the insured's condition, together with all other information, gave the petitioner the essential facts upon which its liability would depend, thus meeting the requirement of due proof. The Circuit Court of Appeals sustained these findings and conclusions (R. Vol. II, p. 388) on substantial evidence.

It appears that petitioner's real complaint under its second point is not in the law followed by the Court of Appeals but in its sustaining adverse questions of fact. Such action of the Circuit Court of Appeals is not subject to review on certiorari.

IV.

The Circuit Court of Appeals Properly Sustained the District Court Which Denied Petitioner's Motion to Assert a New Defense, "Abandonment," After the Cause Had Been Remanded.

Although it is not mentioned in the Petition, or Brief in support, the motion to assert the defense of abandonment was made after the cause had been remanded to the District Court (R. Vol. II, p. 2). The motion was denied before trial of the limited issue (R. Vol. II, p. 3).

The District Court properly so ruled. The remand was not for general purposes but only for the limited purpose specified in the opinion of the Appellate Court (R. Vol. I, pp. 223, 224, 225).

The defense was not meritorious. It was an attempt to litigate under the name of "abandonment," the same matters litigated under the defenses of waiver, estoppel, and laches, all of which had been adversely adjudicated against petitioner. "Abandonment" like "waiver" involves the relinquishment of a known right. The findings on that issue having been adverse, petitioner was deprived of no defense, even if the motion to amend was timely. The Circuit Court of Appeals properly so found.

ARGUMENT.

POINT I.

The Jurisdiction of This Court Is Not Properly Invoked.

The Petition for Certiorari filed in this matter and Brief in Support clearly indicate that petitioner is seeking by this writ to secure an additional appeal on the merits, having already been twice unsuccessful in the District Courts and twice on appeal to the Circuit Court of Appeals (8 Cir.). It is admitted by Petitioner that the petition for this remedial writ is not predicated upon any provision of the Constitution of the United States, a statute of the United States, or a conflict between decisions of the several Circuit Courts of Appeal.

If there is any basis for the issuance of the writ prayed for, it must be found in a tenuous extension of the doctrine of **Erie Railroad Company v. Thompkins**, 304 U. S. 64. However, the petitioner can point to no failure of the Circuit Court of Appeals to follow a clear-cut line of Missouri cases which are contrary in principle to holdings of the Federal courts, as was true in the **Erie** case. Petitioner does not charge that the Circuit Court of Appeals has failed to follow adjudications by the courts of the State of Missouri between the parties on the issues involved, as was the situation in **Stoner v. New York Life Insurance Company**, 311 U. S. 464; **West v. American Telephone and Telegraph Company**, 311 U. S. 223. It is not even charged that the Circuit Court of Appeals failed to follow Missouri adjudication under the extension of the **Erie** case principle as exemplified by **Fidelity Union Trust Company v. Fields**, 311 U. S. 169, and **Moore v. Illinois Central Railroad Company**, 312 U. S. 630.

On the contrary, petitioner principally seeks a review

of the application of general principles of Missouri law as applied by the Circuit Court of Appeals to a factual situation, found adversely to petitioner, namely, the doctrine of equitable estoppel. Petitioner's real complaint is not the failure of the Circuit Court of Appeals to follow Missouri law, but the failure of that Court to reverse adverse findings of fact.

The doctrine of estoppel and the principles underlying it are not novel; the Circuit Court of Appeals in its application to the facts in the case sought to be reviewed followed a long line of cases of the Missouri Supreme Court.

That this writ seeks to secure for petitioner an additional general review on appeal is demonstrated by the fact that under Point Two, B, of the Brief in Support (pp. 33-36), not a Missouri case is cited; similarly under Point Three (pp. 39-42) not a single Missouri case is cited as to what does or does not constitute "abandonment," although the Circuit Court of Appeals on that issue carefully followed Missouri law.

If more were needed to establish such to be the purpose of the writ applied for, it stands forth at pages 18-21, inclusive, which attack findings, that the insured during the period involved was totally and permanently disabled within the meaning of the policy in suit. This question is not even referred to by petitioner under "Summary Statement of the Matters Involved" nor in "The Questions Presented to the Court."

Further, a serious question exists whether the principal question here urged in a spread-eagle fashion, namely, "estoppel," is now properly subject to a petition for certiorari under Sec. 8 of the Act of Feb. 13, 1925, as amended, Title 28, U. S. C. A., Sec. 350; Sec. 8, 43 Stat. 940, inasmuch as that question was adversely adjudged against petitioner, in a judgment which became final June 12, 1944 (R. Vol. I, p. 225).

The resume of this litigation previously set out makes

it quite clear that the issue of estoppel was pleaded, tried, and determined on the first appeal. No petition for Certiorari was sought following the final judgment in that case.

We find no adjudicated case sustaining the petitioner's right to certiorari as to matters adjudicated by the first appeal, and petitioner cites none.

A superficial analogy may be developed from cases cited by the petitioner (**Rogers v. Hill**, 289 U. S. 582; **Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.**, 240 U. S. 251; **Simmons Company v. Grier Bros. Co.**, 258 U. S. 82; **Panama Railroad Company v. Napier Shipping Co.**, 166 U. S. 280).

Those cases are distinguishable in that they dealt with the determination of interlocutory matters principally in injunction proceedings in equity. None, as here, dealt with finally concluded issues of fact and law tried and determined on appeal. The second trial on the matters here before the Court was a trial of a limited question. It presented but a single factual issue, namely, were the proofs of loss previously submitted by the insured and accepted by petitioner sufficient to bring into fruition his contractual rights under the facts of the case, or were these rights, despite insured's total and permanent disability during the period in question, to be forfeited for failure to meet the technical requirement of due proof?

Absent petitioner's contention based upon estoppel, there would be little substantive matter in the Petition and Brief in Support. Since this question was decided against petitioner, more than two years ago, it is suggested that this, without more, is sufficient ground for the Court to deny the writ. This suggestion is of particular force when, as above pointed out, the premise of the writ is not based upon **Erie Railroad Co. v. Thompkins**, or any extension of that principle.

Even so, a consideration of the petition on its merits conclusively demonstrates that the Circuit Court of Appeals followed and applied Missouri law.

POINT II.

The Circuit Court of Appeals, Under the Facts, Correctly Applied the Principles of Estoppel as Enunciated by Missouri Authority.

Petitioner in its Brief hinges practically all points upon the alleged failure of the Circuit Court of Appeals to properly apply and follow the principles of estoppel as enunciated by the Missouri courts.

Petitioner takes the categorical position that the doctrine of equitable estoppel shall be applied as against a party who makes a statement even though that party may not then be apprised of the facts in relation to the statement which is to be the predicate of the estoppel (Petitioner's Brief, p. 22). Therein lies petitioner's error.

In taking this position petitioner recognizes that under Missouri law a waiver "results only from an intentional relinquishment of a **known** right" (Petitioner's Brief, p. 22). The Circuit Court of Appeals on the first appeal sustained findings that the insured had not waived the cause of action in question because of his lack of knowledge at the time of the acts alleged to constitute the waiver. These findings and the law applied thereto are not attacked in this petition. Petitioner, therefore, admits the correctness of the Findings and Conclusions that the insured in writing the much referred to letter of March 15, 1932, had no intention of waiving his contractual rights and was not then apprised of the fact that he was totally and permanently disabled within the meaning of the policy in suit. Admitting this fact, as petitioner does, it nevertheless takes the position that absent this knowledge, the insured was by that letter estopping himself, and his representatives, from demanding the benefits of the same contractual rights. It is elementary that estoppel cannot operate in a vacuum.

This position also ignores the admitted fact that the in-

sured in the letter of March 15, 1932, made no misrepresentation of fact of any kind. On the contrary, that letter in all candor stated the simple truth, namely, that the insured was "back at my desk for short periods each day."

That letter in and of itself approaches a statement of total and permanent disability as announced by the courts of the State of Missouri, namely, that the insured was no longer able to perform all the substantial and material acts essential to his occupation within the meaning of the policy provisions here in suit (**Stoner v. New York Life Ins. Co.** [Mo. App.], 90 S. W. [2d] 784; **Stoner v. New York Life Ins. Co.**, 232 Mo. App. 1048, 114 S. W. [2d] 167; **Stoner v. New York Life Ins. Co.**, 311 U. S. 464; **Comfort v. Travelers Ins. Co.** [Mo. App.], 131 S. W. [2d] 734; **Moss v. Metropolitan Life Ins. Co.**, 230 Mo. App. 70, 84 S. W. [2d] 395, cert. quashed 338 Mo. 589, 92 S. W. [2d] 122).

The fact that the insured insisted upon spending time on the business premises of the company, which he had founded and had devoted his life to, is immaterial because, as was pointed out by the Supreme Court of Missouri in **Bellows v. Travelers Ins. Co.** (Mo.), 203 S. W. 978, "Nothing but death or complete mental collapse equivalent to death could extinguish this (desire) in a normal man."

The Missouri Supreme Court has held that in testing the conduct or acts which are asserted to constitute the estoppel "the conduct of the person alleged to be estopped must be viewed in the light of the understanding he had of his rights at the time the one seeking to invoke estoppel acted and not in the light of what thereafter may be learned or as such rights may thereafter be determined, 21 C. J. 1151-52." **Wilkinson v. Lieberman**, 327 Mo. 420, 37 S. W. (2d) 533.

At the time the letter of March 15, 1932, was written, the insured, no doubt, was under the mistaken impression that if he returned to his place of business at whatever

risk and under whatever circumstances, he must then forego contractual benefits under these insurance policies. The insured acted with commendable frankness, as the Circuit Court of Appeals in this case points out, "because the insured, under the erroneous impression that if he performed any of his former duties, his right to disability-benefits ceased, fair-mindedly informed the insurer that he was attempting to carry on part of his previous work and indicated that he assumed that he, therefore, was not entitled to receive further benefits" (R. Vol. II, p. 386). The petitioner took no step to correct the misapprehension but took advantage of the statements and now seeks to use these truthful statements as a predicate of estoppel as against the representatives of the man who made them.

In contending that the doctrine of estoppel is a bar, the petitioner overlooks the fact that one of the essentials of estoppel in pais is that the acts relied upon to create the estoppel shall be, if not actually fraudulent, at least tortious in character, amounting to intentional misrepresentation or concealment of material facts. This is the Missouri law.

The Missouri Supreme Court in the case of **Blodgett v. Perry**, 97 Mo. 263, 10 S. W. 891 (1888), stated as follows, l. c. 272, 273:

> "Now as to the plea of estoppel in pais or equitable estoppel . . .
>
> "An eminent text-writer treating of the subject of estoppel says: 'The cases when carefully analyzed show that all of the following elements must actually or presumably be present in order to an estoppel by conduct: 1. There must have been a false representation or a concealment of **material facts**. 2. The representation must have been made with **knowledge** of the facts. 3. The party to whom it was made must have been **ignorant** of the truth of the matter. 4. It must have been made with the **intention** that the other

party should act upon it. 5. The other party must have been **induced** to act upon it.' Bigelow on Estoppel, 3rd Ed. 484."

This summary of the essential elements of the doctrine has been followed without deviation by the Missouri Courts. **Burke v. Adams**, 80 Mo. 504; **Lack by Scudder, Guardian, v. Brecht**, 166 Mo. 242, 65 S. W. 976; **Oldham v. Wade**, 273 Mo. 231, 200 S. W. 1053; **Rhoads v. Rhoads**, 342 Mo. 934, 119 S. W. (2d) 247; **Prouse v. Schmidt** (Mo.), 156 S. W. (2d) 919; **Hamilton v. North Eastern Mutual Insurance Assn.** (Mo. App.), 116 S. W. (2d) 159; **Taylor v. Farmers Bank of Chariton County**, 349 Mo. 407, 161 S. W. (2d) 243.

The cases cited by petitioner under Point I of its brief when analyzed set forth no contrary principle of law. In the cases cited there was no question but that the person claimed to be estopped had full knowledge of the facts. As a matter of fact, the Supreme Court in the **Biggs** case, a case heavily relied upon by petitioner, stated that in order to establish an estoppel "there must be a material misrepresentation of fact" (**Biggs v. Modern Woodmen of America**, 336 Mo. 879, 82 S. W. [2d] 898).

If the act of the insured in writing the letter of March 15, 1932, which in the final analysis is the basis of this petition, is considered in the light of the facts, namely, his knowledge and the truth of the statements made, it can be easily understood why the Circuit Court of Appeals ruled that "no fact situation is present justifying estoppel" (R. Vol. I, p. 213).

POINT III.

The Circuit Court of Appeals Followed the Law of Missouri in Holding That the Proofs Furnished Petitioner by Insured in October, 1930, Were Sufficient to Serve as Proofs Under the Policies for the Period Here in Suit.

This cause was remanded to the District Court for the limited purpose of "findings, conclusions, and judgments as to the sufficiency of the proofs of loss of May 30, 1930,* to serve under the circumstances as proof of loss of the claimed 'continuous' disability extending through the period here involved" (R. Vol. I, p. 223).

The Circuit Court of Appeals in affirming the judgment of the District Court, which sustained the sufficiency of the proofs in question, followed the law of Missouri.

The law of Missouri and, for that matter, in every State, is clearly predicated upon the principle that provisions contained in insurance policies relating to notice and due proof are for the benefit of the insurance company and not the insured; are purely technical in character; and that a liberal construction should be given such provisions, both as to their meaning and as to compliance therewith.

This principle no doubt is in part due to the recognition by the Missouri Courts that "the event which causes the loss to the insured is the occurrence of an accident or the beginning of a period of illness and not the giving of notice." **Schoen v. American National Insurance Company**, 352 Mo. 935, 180 S. W. (2d) 57.

These principles are expressed by the Supreme Court

* The Court of Appeals in its opinion on the first appeal referred to the proof of loss of May 30, 1930. This was the approximate date of the onset of the disability. The proofs which the Court of Appeals no doubt had in mind were proofs dated in October, 1930, referring to the onset of the disability as of May 29, 1930. (See Petitioner's Exhibit 12, R. Vol. II, pages 377, 379, and Respondent's Exhibits C-1 to C-4, inclusive, R. Vol. II, pages 26 to 28.) All parties so construed the opinion of the Court of Appeals and accordingly tried the case on the special issue submitted not only in the District Court, but on appeal.

of Missouri in the case of **Hablutzel v. Home Life Insurance Company of New York**, 332 Mo. 920, 59 S. W. 2d 639, affirming the decision of the St. Louis Court of Appeals, reported in 52 S. W. 2d 480.

In that case the Supreme Court of this state, in discussing this question, states as follows:

> "So far as we are advised, the Courts have never defined, except in very general terms, what is meant by 'due proof' as used in insurance policies. Having stated the requirement in such indefinite terms, leaving the insured to determine the meaning of the requirement, and make proof accordingly, the Company ought not be permitted to insist upon a technical compliance with the provision, **either as to form or substance.** It is clear that the proof does not have to be in writing, nor need it be sworn to, **nor must it be the strongest or the best proof available, if it is such as to give the insurer the essential facts upon which its liability depends, and is such as is credible and ought ordinarily to induce belief in the truth of the facts stated, it would seem that it should be regarded as sufficient to meet the requirements of due proof.**" (Emphasis ours.) L. c. 332 Mo. 936.

The St. Louis Court of Appeals, in the case of **Corcoran v. Metropolitan Life Ins. Co.** (Mo. App.), 93 S. W. 2d 1027, in considering the proof necessary to comply with the due proof provisions of a disability policy, ruled (l. c. 1029):

> "* * * Besides we do not understand that the insured, in order to comply with the requirement for due proof, must present to the insurer an undisputed state of facts, or a state of facts on which the insurer could arrive at but one conclusion as to its liability."

As further indication of the liberality of the application of this principle, we note that in the cases of **Wayne v. New York Life Ins. Co.**, CCA 8, 132 Fed. (2d) 28;

Hablutzel v. Home Life Ins. Co. of New York, 52 S. W. 2d 480, affirmed by the Missouri Supreme Court, 332 Mo. 920, 59 S. W. 2d 639, and **Feinberg v. New York Life Ins. Co.**, 233 Mo. App. 707, 127 S. W. 2d 82, the Missouri Courts, and the Federal Court applying Missouri law, have all held that an oral statement to a representative of an insurance company, that the insured is disabled, is sufficient compliance with the requirement of due proof. Those cases further hold that the insured or his executors may recover disability benefits accruing after such statement, upon proof that the insured had been or was totally and permanently disabled.

The attitude of the Missouri Courts on what constitutes due proof is further illustrated by the case of **Wollenberg v. Equitable Life Assurance Society of the United States** (Mo. App.), 96 S. W. 2d 57, wherein it was held that a copy of a petition, served upon the insurance company before any right to maintain a suit for disability benefits had accrued, and therefore requiring the dismissal of the suit, was sufficient to constitute due proof to sustain a judgment of disability in a subsequent suit, brought after the right to maintain the same, had accrued.

The Courts have gone further in expressing a liberal view on the question of due proof in cases of mental disability. In that situation, they have dispensed with proof of the disability. **Schoen v. American National Ins. Co.**, 352 Mo. 935, 180 S. W. 2d 57; **Magill v. Travelers Ins. Co.** (CCA 8), 133 Fed. 2d 709.

In the trial before the District Court and on appeal respondents contended that the proofs in question were sufficient because the insured, having given proofs, accepted as sufficient by the company, of the permanent disability which continued to his death, was not required to give any additional proofs, but only evidence of the continuation of the same disability during the period in suit.

The opinion of the Circuit Court of Appeals, subsequent to trial on this special issue, followed this contention. In so doing the Court clearly was correct, not only under the provisions of the policy, but under the law applicable thereto. The pertinent policy provisions read as follows:

> "(1) Disability benefits before age 60 shall be effective upon receipt of due proof (the insured was approximately 50 years of age May 30, 1930), * * * in which event the Society will grant the following benefits:
>
> "(a) Waive payment of all premiums payable upon this policy to and after the receipt of such proofs and **during the continuance of such total and permanent disability; and**
>
> "(b) Pay to the insured a monthly disability annuity as stated above * * * during the continuance **of such total and permanent disability.**" (Emphasis ours.) (R. Vol. I, pp. 27, 29.)

The policy provisions, above set out, in so many words predicate liability upon continuous disability, which in this case was established by substantial evidence and findings sustained by the Appellate Court.

The case of **Boillot v. Income Guaranty Company**, 231 Mo. App. 531, 102 S. W. 2d 132, is authority, if any is needed, in addition to the policy provisions. In that case it appeared that the insured sustained an accident* which he contended resulted in his permanent and total disability within the meaning of the insurance policy in question. Notice and proof was given to the insurance company. The insurance company refused to pay and suit was instituted for disability benefits resulting in judgment for the in-

* The Supreme Court of Missouri, en banc, in the case of **Schoen v. The American National Insurance Company**, 352 Mo. 935, held that there is no distinction in principle and in law between accident insurance policies and disability benefit provisions contained in life insurance policies.

sured. The Company after a time refused to continue payments and a new suit was brought. The insured gave proof of the continuation of the same disability. The company contended that new proofs were required to sustain the second suit and that mere proof of the continuation of the disability was not sufficient.

In ruling this contention adversely to the insurance company the Appellate Court pointed out:

> "Defendant further contends that the plaintiff failed to prove * * * that he made due proof of his disability as a condition precedent to his right to demand payment and to recover; * * * such proof was made in and by the former suit, as well as prior to the institution thereof; and by that former suit, the plaintiff established his right to recover for total disability, according to the terms of the policy, so long as he lives. It is well-settled principle that the law does not require useless action * * *. Further proof of disability was unnecessary."

Similarly, in the present case, the insured in 1930 made proof of the facts upon which the claim for disability in this case is predicated. In the **Boillot** case the insured had to litigate to establish his total and permanent disability. In the present case it was recognized and accepted on the proofs submitted October, 1930 to the petitioner.

Certainly the rationale of the **Boillot** case and the plain logic of the matter is that if an insured sustains a disability which is continuous he need but give one notice or proof to the insurance company. The Circuit Court of Appeals properly so held in this case under the policy provisions in question and under the law.

In so holding there is no variance, as petitioner charges, between the issue submitted by the opinion on the first trial and the opinion of the Circuit Court of Appeals in sustaining the judgment of the District Court on the

special issue. It merely sustains the sufficiency of the proof under the circumstances which was the issue submitted.

This argument of petitioner also fails to take into consideration the fact that the respondents contended at the trial and on appeal that the proofs in question were sufficient because those proofs when fairly considered, together with all of the information the petitioner then had concerning the insured, were sufficient to advise petitioner of the essential facts upon which its liability would depend. This was the purport of the medical testimony at the trial (R. Vol. II, pp. 32, 59, 75, 76).

The District Court found in accordance with these contentions (R. Vol. II, p. 356, Findings of Fact 4 to 5). In referring to these findings, which were attacked by petitioner on appeal, the Circuit Court of Appeals expressly sustained the findings in the following language:

> "We may add, however, that the evidence sufficiently supports Findings 4 and 5, 59 F. Supp. at page 793, and that these findings also would require affirmance of judgment."

The sufficiency of the decision of the Court of Appeals in this respect is not questioned by petitioner in the Petition for the writ here applied for or in the Brief in Support.

The Petitioner's argument under Point 2-C is again predicated on estoppel. What has been said under Point I of this Brief in regard to the law of estoppel is equally applicable in answer to this contention. There is even an additional answer. The estoppel here charged is not against asserting the cause of action in suit, but against asserting the sufficiency of the proof in question. Such an estoppel was not pleaded. See defendant's answer (R. Vol. I, pp. 12-17).

It is essential in Missouri, as elsewhere, that an estoppel must be pleaded. **Grafeman Dairy Co. v. Northwestern Bank,** 315 Mo. 849, 288 S. W. 359.

It follows that the decision of the Court of Appeals sustaining the proofs in question is amply supported by the evidence and Missouri law.

POINT IV.

The Circuit Court of Appeals Properly Sustained the District Court in Refusing to Allow Petitioner to Assert a New Defense After the Cause Had Been Remanded for Trial on the Special Issue.

The petitioner asserts that the issuance of this writ should follow, because the Circuit Court of Appeals sustained the action of the District Court in refusing to allow petitioner, following the remand of the case, to amend its answer and to assert thereby an entirely new defense designated "abandonment".

No such defense was originally pleaded and no attempt was made to assert the same until after the cause had been remanded by the Circuit Court of Appeals for trial on the limited issue therein specified.

These facts do not appear in the Petition or Brief in support thereof. This we take it is a sufficient answer to the contentions there made. The remand limited the scope of the second trial. **Thornton v. Carter** (CCA 8), 109 F. 2d 316.

Even so it was no error because the facts relied upon to establish the alleged defense of abandonment had been fully considered and adjudicated under the affirmative defenses of waiver, laches and estoppel.

It was held on the first appeal that the insured had not waived the cause of action in question because of his lack of knowledge at the time of the acts alleged to constitute the waiver. No error is charged by petitioner in respect

to this finding. An essential element of defense of waiver or abandonment is knowledge and such is the law of Missouri. **Pocoke v. Peterson,** 256 Mo. 501, 165 S. W. 1017.

If the lack of knowledge precluded the defense of waiver, it likewise precluded the defense of abandonment, for that defense, like waiver, involves the conscious relinquishment of a known right. It follows, even if the motion were timely, that Petitioner, by its denial was deprived of no defense.

CONCLUSION.

It is submitted that the Petition for Certiorari and Brief in Support thereof present no question requiring the exercise of the jurisdiction of this Court. Petitioner has had its day in court and the Circuit Court of Appeals, in sustaining the judgment in favor of respondent, followed the law of the State of Missouri. The petition should be denied.

Respectfully submitted,

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